Nos. 88-1671 and 88-1688

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES DEPARTMENT OF LABOR,
Petitioner

v.

GEORGE R. TRIPLETT, *et al.*

COMMITTEE ON LEGAL ETHICS OF THE
WEST VIRGINIA STATE BAR,
Petitioner

v.

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On Writ of Certiorari to the Supreme Court of Appeals of West Virginia

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BRIEF OF AMICUS CURIAE UNITED MINE WORKERS OF AMERICA IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST

The United Mine Workers of America represents over 200,000 working, retired and laid-off coal miners throughout the United States and Canada. The UMWA has, for decades, been the primary advocate of miners disabled by pneumoconiosis, or "black lung," and devoted a great deal of its energy and resources to the passage of the Federal Coal Mine Health and Safety Act of 1969, 30

U.S.C. Sec. 801 *et seq.*, 83 Stat. 792, which includes the Black Lung Benefits Act, 30 U.S.C. 901 *et seq.* (1982 & Supp. V 1987), which is the subject of this case. The UMWA is filing this amicus brief because of its concern that its members, and coal miners generally, are increasingly unable to secure legal representation to assist them with complex, burdensome black lung claims due to an attorney fee system which discourages lawyers from handling their cases. All of the parties to the instant case have given written consent to the filing of this amicus brief.*

It should be noted at the outset that the United Mine Workers does not support the complete elimination of all regulation of attorneys' fees in connection with black lung disability litigation. Rather, the Union comes before this honorable Court to urge that the present fee system is so cumbersome, arbitrary, and fraught with delay, that coal miners are losing, rather than gaining, the statute's protections as legal representation becomes extremely difficult to retain. The Court's ruling in this case will directly affect the ability of miners disabled by black lung to secure the expert advice and representation from lawyers versed in the complexities of the Black Lung Benefits Act.

INTRODUCTION

Throughout the coalfields of the United States, miners toil in the coal mines while inhaling the fine black dust which is produced as the coal is extracted. Slowly but surely, they become progressively disabled as the coal dust settles in their lungs, until pneumoconiosis makes breathing so labored and painful that they can engage in virtually no gainful activity. A young man may enter the mines after leaving high school and find himself suffering from black lung ten years later, when he is in

* The parties' letters of consent, pursuant to Rule 36 of the Rules of this Court, have been filed with the Clerk of the Court.

his late twenties or early thirties. As the miner becomes increasingly unable to work and to function generally because of black lung, his family suffers the emotional and financial hardship of his disease. In the State of West Virginia, where "coal is king," the population of miners suffering from black lung is especially large.

Although coal miners have long suffered from occupational pneumoconiosis, it was not until 1969 that Congress recognized this disabling disease and passed the Black Lung Benefits Act ("BLBA") as part of the Federal Coal Mine Health and Safety Act.[1] The passage of the Black Lung Benefits Act was prompted, in part, by the failure of state workers' compensation laws to adequately address and compensate black lung disease. 30 U.S.C. § 901(a) (1982 & Supp. V 1987). Since its passage, the BLBA has been amended, and the regulations issued in connection with the statute have gone through numerous changes and permutations. Originally, the legislation covered only underground coal miners and their wives or widows, and pneumoconiosis was defined as "a chronic dust disease arising out of employment in an underground coal mine." 30 U.S.C. § 902 (1969). In 1972, 1977 and 1981, eligibility requirements for black lung disability benefits and the definition of pneumoconiosis were liberalized, but new procedural rules were introduced that made applying for benefits and proving a claim a complicated, frustrating process.[2]

[1] 83 Stat. 792, 30 U.S.C. 801 *et seq.*

[2] Black Lung Benefits Act of 1972, 86 Stat. 151, 30 U.S.C. 901 *et seq.*; The Black Lung Benefits Revenue Act of 1977, 92 Stat. 11; The Black Lung Benefits Reform Act of 1977, 92 Stat. 96; The Black Lung Benefits Amendments of 1981, 95 Stat. 1643; The Black Lung Benefits Revenue Act of 1981, 95 Stat. 1653, 26 U.S.C. 1 note and the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 13203(a)(d), 100 Stat. 312, 313, 26 U.S.C. 9501 note (1986).

With the passage of the Black Lung Benefits Amendments of 1981, 95 Stat. 1643, three of the five rebuttable presumptions of pneumoconiosis were eliminated, creating much greater evidentiary burdens for miners applying for benefits.[3] Under the 1981 amendments, restrictions against the Department of Labor's use of second opinions to analyze chest X-rays were eliminated, and restrictions on the interpretation of affidavits in the case of a deceased miner were eased. 30 U.S.C. §§ 202(c) and 203(a) (1982). The amendments also limited the payment of benefits to survivors to those cases where the claimant can establish that the miner's death was due to pneumoconiosis, and allowed for the reduction of benefits where a miner receives "excess earnings." 30 U.S.C. §§ 203(a) and (b). The impact of the 1981 amendments on coal miners' black lung disability claims has been profound—of the 58,680 claims filed between January 1982 and March 1988, only 5.8 percent were finally approved.[4]

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[3] The amendments eliminated the following presumptions: 1) Section 411(c)(2) had allowed a rebuttable presumption that a miner's death was due to pneumoconiosis if he died from a respiratory disease and was engaged in coal mine employment for at least 10 years; 2) Section 411(c)(4) had allowed a rebuttable presumption that a miner not diagnosed as having complicated pneumoconiosis had the disease if evidence demonstrated the existence of a totally disabling respiratory or pulmonary impairment and the miner was engaged in coal mine employment (underground or conditions substantially similar to underground) for at least 15 years; and 3) Section 411(c)(5) had allowed a rebuttable presumption in the case of a survivor of a coal miner who died before March 2, 1978 and who had at least 25 years of coal mine employment prior to June 30, 1971, unless it was established that at the time of death the miner was not partially or totally disabled due to pneumoconiosis.

[4] Statistics provided by the U.S. Department of Labor, Office of Coal Mine Safety and Office of Workers' Compensation Programs; *Delays in Processing and Adjudicating Black Lung Claims: Hearings Before the Employment and Housing Subcommittee of the*

Under the BLBA, Congress created two classes of claims, "Part B" and "Part C" claims. The classification of a claim and the particular set of regulations which govern it depends on the date of the filing of the claim. Part B of the Act governs claims filed before July 1, 1973. Part C of the Act is divided into subsections; one part governs claims filed on or after July 1, 1973 but before April 1, 1980, and the other part covers claims filed after April 1, 1980. Depending on the type of claim, it will be regulated by "permanent criteria" or "interim regulations." Medical and other evidence of black lung which may be used to establish eligibility for benefits is specialized and complex, and may include X-rays, pulmonary function tests, physical examinations, and arterial blood-gas studies. 20 C.F.R. 718.101-718.107. Even the most learned judges have found the statute and its regulations confusing. See, *Pittston Coal Group v. Sebben*, 488 U.S. ——, 109 S.Ct. 414, 102 L.Ed.2d 408, 417 (1988). For the average coal miner, who will most likely have a high school education or less, the application and claim procedure can be a nightmare.

SUMMARY OF ARGUMENT

A miner who applies for black lung disability benefits must prove that he is "totally disabled because of pneumoconiosis, a chronic respiratory and pulmonary disease arising from coal mine employment." *Pittston Coal Group v. Sebben, supra*, 102 L.Ed.2d at 416. Under the Department of Labor's regulations, a coal miner may introduce evidence of his disability, and, in some cases, raise a rebuttable presumption of disability, by presenting certain medical evidence. Even if the miner presents the

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House Committee on Governmental Operations, 99th Cong., 1st Sess. at 55-56 (1985) (GAO Report HRD-85-19); Pet. App. 14a. The Department of Labor estimates that only 5% of cases are finally approved. Pet. Brief 34.

requisite evidence, it is subject to interpretation by medical experts, and where expert opinions conflict, an Administrative Law Judge is free to find that the evidence does not prove the claim. The degree of specialization which is part of the evidentiary process and the difficulty non-experts have in comprehending the relevant medical evidence has been commented upon by this Court:

> "For the ordinary trier of fact—even an ALJ who has heard many black lung benefit cases—an X-ray may well be meaningless unless it is interpreted by a qualified expert. What may be persuasive to the ALJ, then, is not just the X-ray itself, but its interpretation by a specialist. And, of couse, different experts may provide different readings of the same X-ray." *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 108 S.Ct. 427, 98 L.Ed.2d 450, 463 (1987).

The regulations which govern the miner's claim and his evidentiary burden have been criticized as a "procedural morass." *Id.*, 98 L.Ed.2d at 475 (dissent of Justice Marshall, with whom Justice Brennan joined).

The Seventh Circuit, too, has been impressed with the complexity of the proving a claim under the Black Lung Benefits Act and its regulations:

> "We recognize that the distinction between medical criteria and evidentiary rules is necessarily somewhat elusive. While the requirements set out in Section 727.203 (a)(1)-(5) are medical criteria indicating the existence of a chronic respiratory or pulmonary impairment, the manner in which a miner demonstrates that he has satisfied any one of those requirements is an evidentiary matter. For example, the fact that certain opacities are revealed by a chest X-ray is a medical criterion of pneumoconiosis under

> (a)(1), but whether the X-ray actually reveals these opacities is a question of evidence." *Strike v. Director, OWCP*, 817 F.2d 395, 405 n.7 (7th Cir. 1987).

The decision making process with respect to a miner's eligibility takes place in an adversarial forum, and the litigation of claims requires a high degree of expert knowledge on the part of the attorney representing a claimant. A lawyer who is not familiar with the statute's many and varying procedural requirements, and the specialized medical knowledge surrounding pneumoconiosis, cannot simply pick up a case from time to time, anymore than a general practitioner could litigate a medical malpractice action now and then. Litigation of black lung claims requires a lawyer to devote a great deal of time and energy to developing his or her expertise. It is a highly specialized field of law. Thus black lung claims do not lend themselves to occasional pro bono work by law firms.

If miners disabled by black lung are to find attorneys to competently advise and represent them, they must be able to look to a stable cadre of lawyers who devote themselves to the field. The Department of Labor's present regulations governing the payment of claimant's attorneys' fees, however, discourage lawyers from practicing black lung disability law because it is difficult, if not impossible, to sustain a livlihood from such a practice. The net result is that the miners who so desperately need their advice and counsel do not get it, and are left to face the quagmire of the Black Lung Benefits Act alone. Without this advice and counsel, the promise of relief that the statute holds out to those disabled by black lung becomes illusory, and turns the claim process into a confusing, insurmountable tangle of laws and regulations that overwhelms the average miner.

The attorney fee system under the Black Lung Benefits Act was intended by Congress to protect miners from unethical lawyers. However, the fee system operates in a

manner that is so onerous and hostile to legitimate concerns of lawyers over obtaining reasonable compensation in a timely manner, that the "best and brightest" of claimants' attorneys have given up their black lung practice or are considering doing so. Instead of protecting miners, the attorney fee system is leaving them exposed to skilled, inexhaustible defense lawyers, against whom they cannot possibly battle on their own.

ARGUMENT

THE PRESENT REGULATIONS GOVERNING PAYMENT OF FEES TO A CLAIMANT'S ATTORNEY DISCOURAGES LAWYERS FROM PRACTICING IN THE FIELD OF BLACK LUNG DISABILITY, THEREBY DENYING DISABLED MINERS THEIR FIFTH AMENDMENT RIGHT TO DUE PROCESSS

Section 932 of the Black Lung Benefits Act incorporates provisions of the Longshore and Harbor Workers Compensation Act. Accordingly, a claimant has the right to be represented "in any proceeding for determination of a claim" by an attorney or other representative. 20 C.F.R. 725.362, 725.363. A claim may make its way through several bureaucratic layers. A miner must first file his claim with a deputy commissioner at the Department of Labor, who notifies all interested parties, investigates the claim and determines the miner's eligibility for benefits, and issues a proposed decision and order. 30 U.S.C. § 932(a) (1982 & Supp. V 1987), incorporating 33 U.S.C. § 919; 20 C.F.R. 702.311-702.317. If the deputy commissioner denies the claim, a form letter is sent to the claimant indicating the denial and a sixty day period in which to appeal. It does not, however, provide the claimant with meaningful guidance as to the evidentiary burdens which lie ahead. The Administrative Law Judge conducts a full evidentiary hearing in an adversarial setting. The ALJ's order may be appealed by a party to the Benefits Review Board ("BRB"). *Id.*, 20

C.F.R. 702.317, 702.331-702.351, and 702.391. The notice of appeal to the BRB must be filed with the deputy commissioner within 30 days of the filing of the ALJ's decision. 20 C.F.R. 702.393.

Under the Department of Labor's regulations, an attorney representing a miner in this multi-layered process can obtain fees for his or her service *only* if he or she has won the case and *only* upon a final award. An award of attorney's fees is unenforceable until the claimant receives a final award of benefits. 33 U.S.C. 928(a); 20 C.F.R. 725.367(a); *General Dynamics Corp. v. Horrigen*, 848 F.2d 321 (1st Cir. 1987), *cert. denied*, 109 S.Ct. 554 (1988); *Director, OWCP v. Hemingway Transp. Inc.*, 1 Ben. Rev. Bd. Serv. (MB) 73 (Ben. Rev. Bd. 1974). To obtain a fee, the claimant's attorney must submit an application for fees to the deputy commission, administrative law judge, or appropriate appellate tribunal, depending on the forum before which the services are performed. 20 C.F.R. 725.366. In order to obtain a fee award, the attorney's application must be accompanied by a complete statement of the extent and character of the necessary work done, the professional status of the representative, and his or her customary billing rate. 20 C.F.R. 725.366. No contract or prior agreement between an attorney and the claimant is valid. 20 C.F.R. 725.365. The amount of the fee awarded is discretionary and is determined, inter alia, according to the "necessary work done," "the quality of the representation," the qualifications of the representative, and the complexity of the legal issues involved. 20 C.F.R. 725.366(b). The regulations govern only claimant's attorneys. *Lawyers defending coal companies from black lung disability claims are subject to no such constraints.* Not surprisingly, a coal company or the Disability Trust Fund virtually *never* appears without legal counsel.

These regulations, while intended to protect black lung claimants from unscrupulous lawyers, have had the effect

of discouraging lawyers who genuinely care about black lung victims from practicing in the field. They have found that the heavy paperwork, the delays in obtaining fee awards, the failure of the Department of Labor to recognize the hours of time which complex cases can require, and the risk involved with taking a case in which the claimant does not prevail and therefore having no recourse for payment, all conspire to make black lung disability cases financially onerous.

In its brief, the Department of Labor asserts that the court's finding that the fee system has produced a shortage of lawyers for black lung cases is belied by the Department of Labor's statistics that "92% of the claimants were represented in cases resulting in an award or denial of benefits." Pet. Brief 44. See also Pet. Brief 14. The assertion is simply bogus. While the Department of Labor's statistics may indeed make such a showing, the petitioner fails to point out that the statistics were gleaned from docket sheets where a lawyer was *listed*. It fails to account for cases which never progressed beyond the deputy commissioner stage or which were remanded to the deputy commissioner. It fails to account for the fact that a claimant may list a lawyer as his counsel, and the lawyer may even participate in the early stages of the bureaucratic process, but not continue to represent the claimant throughout the various stages of the lengthy litigation and appeal process. The statistics offered by the Department of Labor are a gloss on the reality that claimants are finding fewer and fewer lawyers to assist them through the many levels of review.

The Department of Labor dismisses the affidavits of five black lung attorneys presented to the Supreme Court of Appeals of West Virginia, averring to the financial difficulties the fee system creates, as self-serving "anecdotal evidence." Unfortunately, and illustrative of the problem, these handful of attorneys now make up more than *one-third* of the entire regular black lung litigation bar in

the State of West Virginia. See, Affidavit of Grant Crandall, paragraph 2, Resp. App. A-30. Mr. Crandall has represented members of the United Mine Workers in a variety of matters, including black lung, for more than thirteen years. Resp. App. A-29. His devotion to the plight of coal miners is unquestioned by the Union, given his many years of hard work on their behalf for relatively little pay. There is no doubt that money is not the driving force behind his practice of law. When a lawyer like Mr. Crandall indicates that his firm may have to reconsider whether to continue representing black lung victims, it is cause for alarm within the Union. The Department of Labor attempts to portray Mr. Crandall, and the other lawyers who submitted affidavits in the proceeding below, as "self-serving" or somehow unscrupulous. They are not. But, as Justice Neely observed:

> "One affiant attorney states that he is currently owed more that $30,000 in fees that have been awarded but not paid . . . In a small, depressed West Virginia town, $30,000 is a substantial amount of money for an individual practitioner. In the long run, as John Maynard Keynes once observed, we are all dead. In the short run, lawyers have offices to run, mortgages to pay and children to educate." Pet. App. 17a.

Indeed, the entire tone of the Department of Labor's brief, in which it almost makes light of the protest of black lung disability attorneys over the fee system, underscores why attorneys find practicing before the agency so frustrating and have become reluctant to continue.

It seems that only the Department of Labor continues to harbor any illusions regarding the impact of the fee system on miners' ability to obtain legal counsel. Even black lung defense counsel have acknowledged that the fee system no longer achieves the desired result of protecting claimants in the litigation process. In a recent article, Allen R. Prunty, the Administrative Manager of

the Federal Black Lung Division at the law firm of Jackson, Kelly, which handles the largest number of defendants' black lung cases nationally, and Mark E. Solomons, a partner with Arter & Hadden who served as appellate counsel for the Department of Labor's coal mine workers compensation program from 1973 through 1978, and as legislative counsel for the Department of Labor from 1978 through 1980, had this to say about Judge Neely's decision in the instant case:

> "The West Virginia Supreme Court of Appeals decision underscores a very real and widespread problem: unavailability of counsel to represent claimants in federal black lung cases. The court was correct in its observation that more and more claimants are forced to represent themselves in hearings before administrative law judges and on appeal to the BRB and circuit courts of appeals. The result is repeated continuances of scheduled hearings, delays in submission of cases for decision on appeal, and an impeded litigation process as judges and appellate tribunals must take care to insure that unrepresented claimants have a fair opportunity to present their cases (footnote omitted).
>
> Although it is true that DOL procedures make it difficult for claimants' attorneys to collect fees, the cause of this problems is more complex. For many years claimants' attorneys were not required to mount a substantial effort to obtain awards for their clients because of the liberal entitlement criteria, particularly the interim presumptions. Now that claimants must prove entitlement on the basis of persuasive medical evidence under Part 718, the representation of federal black lung claimants is a far less attractive prospect. The successful pursuit of a Part 718 claim very simply requires must more effort than was the case under the SSA and DOL interim presumptions. Since DOL does not permit claimants' attorneys to collect a fee if benefits are not awarded (footnote omitted), and since the Black Lung Benefits Reform Act of 1977, as amended, prohibits contingent fees even if an award is made, whatever incentive attorneys may have had to take the cases of federal claimants has largely disappeared. A solution to this problem will require adoption of regulatory changes, and perhaps statutory amendments, to make legal representation of federal black lung claimants less onerous." [5]

The Department of Labor focuses on the determination of the reasonableness of an attorney's fee as the central issue for discontent with the fee system. See, Pet. Brief 21-25, 31. In fact, it is only one of the factors, and not even the most important factor, which makes the fee system, as a totality, unworkable. In its opinion, the Supreme Court of Appeals of West Virginia stressed that numerous aspects of the fee system combine to discourage lawyers from handling black lung cases. They include the delay between the time an attorney takes a case and can finally apply for benefits upon the issuance of a final award (Pet. App. 19a);[6] the inability to collect interest to reflect the loss of income caused by this delay (Pet. App. 20a); the lack of premiums to offset the contingent nature of the work, or fee enhancements or multipliers to account for the services rendered in unsuccessful claims (Pet. App. 20a); the procedural and evidentiary complexity of the statute which requires an attorney to devote

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[5] Prunty, A.R., and Solomons, M.E., *The Federal Black Lung Program: Its Evolution and Current Issues.* 91 W. Va. L. Rev. 665, 727-728 (Spring 1989).

[6] For a case typifying the delay inherent in the claim process, see *Saginaw Mining Co. v. Mazzulli,* 818 F.2d 1278 (6th Cir. 1987) (nine years elapsed between time the miner filed his application for benefits under the BLBA and the time the United States Court of Appeals vacated the ALJ's award of benefits and remanded for processing the claim consistent with procedural requirements of statute.)

a great deal of time and study to black lung litigation in order to competently represent claimants, and makes occasional pro bono work in this area difficult (Pet. App. 18a); and the risk that an attorney will put much time and effort into a case only to find himself unable to collect any fee because the claimant has not prevailed (Pet. App. 20a, 25a-27a).[7]

In spite of an attorney's best efforts, ultimately the risk of losing cases, the burdensome process of submitting fee petitions to a variety of forums, low hourly rates which do not account for much of the time actually spent on a case, and the years it may take to finally prevail in a case and then to get the agency's approval of the fee application, have caused lawyers to reconsider their black lung disability practice. See, Affidavit of Robert F. Cohen, Jr., Resp. App. A-11-13; Affidavit of Robert T. Noone, Resp. App. A-27-A28; Affidavit of Grant Crandall, Resp. App. A-29-A32. And it has not been just private counsel who have felt that financial burden of taking black lung claims. For years, UWMA District 31, which represents UMWA coal miners in approximately the northern third of the State of West Virginia, maintained a Compensation Department for the purpose of providing members with assistance and legal representation in connection with their claims. Resp. App. A-21. However, a decrease in dues income, coupled with the inability to obtain meaningful attorneys fees in connection with black lung cases, forced the District to eliminate the service. This of course, makes the willingness and ability of outside counsel to take cases that the District counsel no longer handle even more imperative. Conversely, as the pool of private attorneys willing to take black lung cases continually shrinks, enoromus pressure is put on UMWA

[7] As discussed *infra*, after the 1981 amendments to the Black Lung Benefits Act, only about 5.8% of all claims ultimately are approved by the time the appeals process is exhausted. Pet. App. 20a.

districts who still provide legal counsel in black lung cases to pick up the slack and carry an unrealistically heavy load. The result is that the miner disabled by black lung must rely on an attorney who is overworked and exhausted, and who often must turn members away because he or she cannot handle any more cases. The coal company defendants, of course, encounter no such problem. There are numerous large, urban law firms who specialize in the defense of black lung claims, and who skillfully use discovery and other evidentiary tools to protract and encumber the investigation and litigation process.

The ultimate victim in the black lung fee system is the very individual the regulations purport to protect—the sick and elderly coal miner. As this brief discussed earlier, the Department of Labor's assertion that 92% of claimants are represented is a sham. Perhaps 92% of all claimants initially contact an attorney about assisting them, or hope that a particular attorney will take their case, and therefore list the lawyer as their counsel, but a far, far fewer number presently manage to secure legal representation. Certainly, only a very small percentage secure a legal representative who will provide them with counsel through the many levels and years of appeal. Instead, if they obtain legal representation, it will more often only be in the preliminary stages of filing a claim and presenting evidence to the deputy commissioner during his investigation. Thereafter, the likelihood that the miner will have legal counsel to assist him decreases significantly.[8] If he desires to continue on his own, he faces an avalanche of legal maneuvering from the coal operator, who faces no such dilemma in finding a lawyer.

[8] In its brief, the Department of Labor emphasizes that Administrative Law Judges help claimants find attorneys. Pet. Brief 37. The fact that claimants cannot independently find lawyers to represent them, but need the assistance of an ALJ, underscores the impact that the fee system has had on the regular, competent claimants' black lung litigation bar.

Coal operators can and do pay their attorneys to appeal successful claims through the entire regulatory maze, to the federal courts of appeal, if necessary. And virtually *every* successful claim by an ALJ is appealed by the employer. The appeal from the ALJ's decision to the Benefits Review Board adds two years to the litigation process. The complexity of the litigation is not an issue for coal operators who have competent counsel, and they spend a great deal to fight black lung claims. Affidavit of Robert F. Cohen, Resp. App. A-16. For a coal operator facing potential liability of $150,000 for a black lung claim, $10,000 to $15,000 for a skilled lawyer is a worthwhile investment. See, Opinion of Supreme Court of Appeals of West Virginia, Pet. App. 22a, n. 29. Defense counsel can, and do, take advantage of discovery procedures which are confusing and burdensome to a coal miner, and obtain an array of expert medical witnesses to contradict whatever medical evidence the miner is able to secure to support his claim. Affidavit of Robert F. Cohen, Resp. App. A-16. The coal miner is, at best, bewildered by the experience, and, more often, embittered by it.

The Department of Labor's attempt to persuade this court that where a miner cannot obtain an attorney, he receives the caring assistance of the deputy commissioner or the Administrative Law Judge as a *pro se* claimant is simply disingenuous.[9] See, generally, Pet. Brief 35-38. As Judge Neely so aptly pointed out, the enormous amount of evidence which defense counsel usually develops to defeat a miner's claim, the burdensome discovery procedures it resorts to, and the procedural maneuvering, creates a "highly adversarial process." Pet. App. 28a. The Department of Labor itself admits the adversarial

[9] The Department of Labor discusses an informal conference which the deputy commissioner may hold to assist the claimants with the resolution of his claim. Pet. Brief 36. While such an informal conference may appear in DOL's regulations (20 C.F.R. 725.416(a)), they are no longer held, in reality.

setting of the ALJ proceedings, and concedes that the black lung program is not conducted in the informal manner of the VA benefits program. Pet. Brief 14, 35, 37. For the average miner, attempting to determine the class of claimants he belongs in, how to proceed, what the time limitations are at various levels of the bureaucratic process for going forward, and how to develop and introduce the requisite medical evidence to sustain his claim is understandably beyond him. The statute is so complex, both from a procedural point of view as well as an evidentiary one, that even an untrained attorney finds it difficult to take a case. Without the assistance of competent counsel to advise him, represent him, and help him understand the claim process, the miner is overwhelmed.

In the final analysis, the fee system operates in a manner which results in the denial of legal counsel to black lung claimants. The need for competent counsel in the confusing regulatory process is intimately linked to a miner's ability to effectively pursue a meritorious claim of entitlement to the black lung program's benefits. These benefits are a statutorily created property interest protected by the due process clause of the Fifth Amendment. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).[10] Under the analysis enunciated by this Court in *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985) this amounts to a violation of the due process clause of the Fifth Amendment. Here, while the government undoubtedly has a legitimate interest in protecting black lung claimants from overreaching attorneys[11] (and

[10] The Department of Labor agrees that "recipients of black lung benefits have a 'property' interest in continuing to receive benefits to which they are entitled under the statute." Br. Brief 13. See also, *Daniels v. Woodbury County, Iowa*, 742 F.2d 1128, 1132-33 (8th Cir. 1984).

[11] This argument is somewhat of a "red herring." Attorney fees do not come out of the miner's pocket. Rather, the responsible

the Union is in agreement with that interest), it is clear that the regulations have not had the desired effect, but have discouraged competent, concerned lawyers from taking claims.

Thus the regulations fail to serve the interest articulated by the Department of Labor in this case. The risk to coal miners disabled by pneumoconiosis that their entitlement to black lung benefits will be jeopardized by the lack of legal representation is readily apparent from the complexity of the statute and the regulations, and the adversarial nature of the claim process. Finally, the private interest at stake is considerable, given that black lung benefits are awarded only where the miner is totally disabled or deceased, and unable to engage in any sort of gainful employment, thus making the benefits financially imperative for him or his survivors.

The Department of Labor's fee system also raises First Amendment issues. "That the states have the broad power to regulate the practice of law is, of course, beyond question (citation omitted). But it is equally apparent that broad rules framed to protect the public and to preserve respect for the administration of justice can in their actual operation significantly impair the value of associational freedoms." *UMWA* v. *Illinois Bar Assn.*, 389 U.S. 217, 222 (1987). The fee system promulgated under the BLBA in the interest of regulating the unscrupulous practice of law cannot operate in a manner which violates the First Amendment right of black lung claimants.

Finally, there is one point over which the United Mine Workers and the Department of Labor are in complete agreement. The touchstone of procedural due process is "fundamental fairness." *Lassiter* v. *Dept. of Social Services*, 452 U.S. 18, 24 (1981), Pet. Brief 20. For the Department of Labor to adopt and enforce regulations that

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operator or the Disability Trust Fund pays claimants' attorneys fees.

essentially establish an unbalanced process whereby everyone has free access to lawyers except the black lung victim, is fundamentally unfair.

CONCLUSION

Based on the foregoing, the judgment of the Supreme Court of Appeals for West Virginia should be affirmed. The Union respectfully submits that if this honorable Court concludes, as petitioner urges, that the record is insufficient to support its finding that the attorney fee award system under 20 C.F.R. 725.362-725.367 violates the due process clause of the Fifth Amendment, that it remand this case with instructions to develop the record accordingly.

Respectfully submitted,

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